

1 Jaime Aguirre-Olivas,)
 2)
 3 Petitioner,)
 4)
 5 v.)
 6)
 7 UNITED STATES OF AMERICA,)
 8)
 9 Respondent.)
 10 _____)

E-FILED - 1/29/13

Nos. C-12-03908-DLJ
 CR-10-00319-DLJ
ORDER

On June 28, 2011 Defendant Jaime Aguirre-Olivas (Aguirre-Olivas) was sentenced to 42 months in prison for a violation of 8 U.S.C. § 1326, Illegal Re-entry following deportation. On February 6, 2012 Aguirre-Olivas filed a Motion for Time Reduction by an Inmate in Federal Custody in his criminal case, CR 10-0319. On July 16, 2012, Aguirre-Olivas filed a Motion under 28 U.S.C. § 2255 to Vacate, Set Aside or Correct his sentence (case C12-3908).

The Time Reduction Motion claims violation of his equal rights as he asserts that were he a United States Citizen he would be entitled to a one year reduction of his sentence for participation in a drug program during his incarceration.

The 2255 Motion claims ineffective assistance of counsel, alleging that at the sentencing counsel for defendant failed to correctly address defendant's prior convictions. Aguirre-Olivas also contends that counsel was ineffective in that he claims counsel caused him to waive his right to appeal.

Having now considered the papers submitted, and the applicable law, the Court hereby denies the motion.

1 I. Background

2 On April 21, 2010, Aguirre-Olivas was charged in a single
3 count indictment with illegal re-entry following deportation in
4 violation of 8 U.S.C. § 1326(a) and (b). On April 12, 2011,
5 Aguirre-Olivas entered an "open" guilty plea. The Court informed
6 Aguirre-Olivas that the maximum prison sentence for this offense
7 was 20 years, the maximum fine was \$250,000 and the maximum term of
8 supervised release was three years. At that court appearance a date
9 was set for sentencing.
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11 Prior to the sentencing, the United States Probation Office
12 issued a Pre-Sentence Investigation Report ("PSR") recommending a
13 sentence of 60 months. On June 21, 2012, Aguirre-Olivas' defense
14 counsel filed a nineteen page sentencing memorandum in which she
15 argued that the Court should enter a sentence of 40 months. The
16 government filed a sentencing memorandum which recommended a
17 sentence of 77 months.
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19 The sentencing hearing was held on June 28, 2011. The Court
20 made the following sentencing calculation: the proper base offense
21 level of 8 was to be increased by 16 levels because of defendant's
22 prior State of California conviction of Assault with a Deadly
23 Weapon, a crime of violence. After the three level reduction for
24 acceptance of responsibility, defendant's adjusted offense
25 level was 21. As Aguirre-Olivas was in Criminal History Category
26 VI, his USSG Sentence Guideline range was 77 to 96 months.
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1 At the sentencing hearing defense counsel made numerous
2 arguments urging the Court to impose a reduced sentence of 40
3 months. Defense counsel objected to the 16-level enhancement, both
4 because the conviction was over 15 years old and also as the
5 enhancement was excessive in light of the circumstances where there
6 was serious bodily injury to the victim. See Sentencing Transcript,
7 at pp. 4-5. Defense counsel further argued that Aguirre-Olivas'
8 prior conviction was "double-counted" because it was counted for
9 purposes of increasing the offense level but had also been taken
10 into consideration in raising his criminal history. Id. at 16-18.
11 Finally, defense counsel urged the Court to take into account
12 various mitigating factors, including Aguirre-Olivas' wife's
13 medical condition, his father's poor health, and daughter's
14 learning disability. Id. at 12-14.

15 The Court considered all of defense counsel's objections.
16 The Court noted that the enhancement was part of the Sentencing
17 Guidelines and so should be included in the calculation but that
18 the Court would take all of counsel's arguments into consideration
19 in determining the final sentence to be imposed. The Court
20 sentenced defendant to a below guidelines sentence of 42 months in
21 light of the age of defendant's prior conviction, the circumstances
22 of the conviction, and the sentencing factors under § 3553(a). Id.
23 6, 22.

24 On July 16, 2012, Aguirre-Olivas filed his Petition, in which
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1 he alleges three grounds for habeas relief. First, he argues that
2 his attorney provided him with ineffective assistance of
3 counsel because she failed to address the fact that his prior
4 Assault with a Deadly Weapon conviction should not have led to a
5 16-level enhancement. He appears to also argue that his
6 attorney was ineffective because she failed to challenge the
7 enhancement due to his prior felony conviction despite that it was
8 not proven beyond a reasonable doubt nor admitted by him, in
9 violation of his Apprendi rights. Third, he argues that "pursuant
10 to the new Supreme Court ruling in Pepper [sic], [he] is entitled
11 relief, in regard to [his] post-sentencing rehabilitation." See
12 Aguirre-Olivas' Petition at page 8.

13 II. Legal Standard

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15 A claim for ineffective assistance of counsel is subject to
16 the two-prong test set forth in Strickland v. Washington, 466 U.S.
17 668, 687 (1984). A lawyer's performance is constitutionally
18 deficient only when it "so undermines the proper functioning of the
19 adversarial process that the [proceedings] cannot be relied upon as
20 hav[ing] produced a just result." Id. at 687.

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22 A petitioner claiming ineffective assistance of counsel bears
23 the burden of demonstrating that, under all the circumstances of
24 his case, (1) his counsel's performance was so deficient that it
25 fell below an "objective standard of reasonableness" and (2) his
26 counsel's deficient performance prejudiced him, meaning "there is a
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1 reasonable probability that, but for counsel's unprofessional
2 errors, the result of the proceeding would have been different."
3 Hensley v. Crist, 67 F.3d 181,184-85 (9th Cir. 1995). Furthermore,
4 "[r]eview of counsel's performance is highly deferential and there
5 is a strong presumption that counsel's conduct fell within the wide
6 range of reasonable representation." United States v.
7 Ferreira-Alameda, 815 F.2d 1251, 1253 (9th Cir. 1987).

9 An evidentiary hearing is not required "if the petitioner's
10 allegations, when viewed against the record, fail to state a claim
11 for relief." United States v. McMullen, 98 F.3d 1155, 1158 (9th
12 Cir. 1996).

13 III. Aguirre-Olivas' 2255 Motion

14 A. Counsel's Alleged Failure Regarding the 16 level 15 enhancement.

16 Aguirre-Olivas first contends that his counsel was
17 ineffective as he asserts that she "failed to address the fact
18 that [his] prior Assault with a Deadly Weapon conviction did not
19 warrant a 16-point enhancement." The Court finds not only that
20 there is no factual support in the record for this claim, but that
21 the record indicates that counsel for Aguirre-Olivas' made numerous
22 efforts to argue this very point, and ultimately the Court
23 concurred with his counsel and gave Aguirre-Olivas a sentence which
24 was substantially below the guidelines range. Counsel for Aguirre-
25 Olivas filed a nineteen-page sentencing memorandum addressing this
26 point and at the sentencing hearing argued that a 16 level
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1 enhancement to the applicable base offense level was excessive
2 because Aguirre-Olivas' prior conviction for Assault with a Deadly
3 Weapon was not a particularly serious one and because the
4 conviction was over 15 years old. See Sentencing Transcript at
5 pages 4-5.
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7 While the Court still found that the 16 level enhancement was
8 appropriate under the current sentencing guidelines, the Court
9 considered defense counsel's objections and arguments in its
10 determination of the appropriateness of a sentencing variance under
11 Booker. Moreover, defense counsel made additional arguments that
12 Aguirre-Olivas' prior conviction for Assault with a Deadly Weapon
13 was "double-counted" because it was counted for purposes of his
14 criminal history and offense level. *Id.* at 16-18. Finally, defense
15 counsel urged the Court to consider additional mitigating factors,
16 including Aguirre-Olivas' wife's poor medical condition, his
17 father's poor medical condition, and daughter's learning
18 disability. *Id.* at 12-14.
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20 Aguirre-Olivas has failed to meet his burden of demonstrating
21 that his counsel's performance was constitutionally deficient, as
22 his counsel in all ways represented him diligently. Moreover,
23 Aguirre-Olivas's claim fails because he has suffered no prejudice
24 as there was no error in the application of the 16-level sentence
25 enhancement and also Aguirre-Olivas received a below guidelines
26 sentence.
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1 B. Counsel's Alleged Failure To Challenge Aguirre-Olivas'
2 Prior Felony Conviction On the Grounds That It Was Not Proven
3 Beyond A Reasonable Doubt

4 Aguirre-Olivas argues that his attorney was ineffective
5 because she failed to challenge that the fact of the prior felony
6 conviction having occurred prior to his deportation had not proven
7 beyond a reasonable doubt or admitted by him, therefore violating
8 his rights under Apprendi v. New Jersey, 530 U.S. 466 (2000). This
9 argument has been foreclosed by Almendarez-Torres v. United States,
10 523 U.S. 224 (1998). See United States v. Almazan-Becerra,
11 482 F.3d 1085, 1091 (9th Cir. 2007) (reaffirming that a prior
12 conviction need not be submitted to a jury and proved beyond a
13 reasonable doubt). See also United States v. Beng-Salazar, 452
14 F.3d 1088, 1091 (9th Cir. 2006) (upholding sentencing enhancement
15 based on prior conviction of crime of violence not admitted by
16 defendant). Therefore, the use of Aguirre-Olivas' prior crime of
17 violence conviction as a sentencing enhancement was valid and
18 his defense counsel's action in not objecting was not deficient.

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20 C. Alleged Waiver of Right to Appeal

21 Aguirre-Olivas alleges without any factual support that his
22 counsel caused him to waive his right to appeal. It is clear from
23 the record at the sentencing hearing that the Court advised
24 Aguirre-Olivas of his right to appeal and the timing and notice
25 requirement attendant to that right. Therefore it is clear that
26 Aguirre-Olivas was on notice of his rights. There is nothing before
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1 the Court which would indicate that defense counsel interfered wiht
2 those rights, and therefore there is no basis for the Court to find
3 defense counsel's performance ineffective.

4 D. Is Aguirre-Olivas entitled to relief under Pepper?

5 Aguirre-Olivas argues that "pursuant to the new Supreme Court
6 ruling in Pepper [sic], [he] is entitled relief, in regard to [his]
7 post-sentencing rehabilitation." See Aguirre-Olivas' Petition at
8 page 8. Aguirre-Olivas relies on Pepper v. United States, 562 U.S.
9 ----, 131 S.Ct. 1229 (2011). In Pepper, the Supreme Court held that
10 when a defendant's sentence has been set aside on appeal and his
11 case remanded for re-sentencing, a district court may consider
12 evidence of a defendant's rehabilitation since his prior sentencing
13 to award a downward variance from the advisory Guidelines range.
14 Id. at 1236. However, Pepper is inapplicable to Aguirre-Olivas, as
15 Pepper does not address habeas corpus proceedings after a final
16 sentence has been ordered which is the case here.

17 IV. Aguirre-Olivas' Motion for Sentence Reduction

18 In his motion for Time Reduction Aguirre-Olivas claims
19 violation of his equal rights as he asserts that were he a United
20 States Citizen he would be entitled to a one year reduction of his
21 sentence for participation in a drug program during his
22 incarceration. However, this argument has been raised previously
23 and rejected by the Ninth Circuit. See McLean v. Crabtree, 173
24 F.3d 117 (9th Cir. 1999).
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V. Conclusion

For the reasons stated above, petitioner's Motion for Sentence Reduction and 2255 Motion are both DENIED.

IT IS SO ORDERED

Dated: January 29, 2013



D. Lowell Jensen
United States District Judge

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Copy of Order Mailed on 1/29/13 to:

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